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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

FREDRIC SANAI,

Petitioner,

v.

GERRY ALEXANDER, an individual; JOSEPH MANO JR., an individual; WASHINGTON STATE BAR ASSOCATION, an entity created under the laws of Washington State; and DOES 1-10, individuals;,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

FREDRIC SANAI
660 2nd Street No. 7
Lake Oswego, Oregon 97034
Telephone: (503) 537-6660 Fax: (503) 434-7553
sanair@co.yamhill.or.us

QUESTIONS PRESENTED

The questions presented are:

1. Does *Younger* abstention apply to lawsuits under 42 U.S.C. §1983 where damages are demanded from at least one defendant, and if so, may the suit be dismissed, or must it be stayed pending outcome of the state court proceeding?

2. Did the Ninth Circuit err in reversing the trial court's judgment dismissing the lawsuit on venue grounds and instead instructing the trial court to dismiss the lawsuit without prejudice under *Younger* abstention, where the trial court explicitly found it was incompetent to address *Younger* abstention issues and declined to make factual findings concerning *Younger*?

3. Did the panel deciding the case lack the appearance of fairness due to their simultaneous service on the Judicial Council considering the related misconduct complaints against Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals and their status as Circuit Judges who regularly interact with Judge Kozinski?

PARTIES TO THE CASE

This petition is in respect of a decision of the Ninth Circuit Court of Appeals, *Sanai v. Alexander*, Ninth Circuit Docket No. 07-35305 (9th Cir. 2008).

The plaintiff, appellant and petitioner is Fredric Sanai, an individual.

The Defendants in the lawsuit are Gerry Alexander, an individual; Joseph Mano, Jr., an individual; and the Washington State Bar Association, an entity created under the laws of Washington State. Only the latter two defendants appeared in the lawsuit.

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PETITION FOR A WRIT OF CERTIORARI

In this case Petitioner Fredric Sanai ("Fredric") filed a suit under 42 U.S.C. §1983 to enjoin attorney disciplinary proceedings against him, providing uncontradicted, admissible evidence of "extraordinary circumstances" which prohibited the application of *Younger* abstention. The circumstances he articulated were, among other things, the financial interest of the Washington State judiciary in the fiercely protected practice of appointing servants or cronies of litigants to the position of special master, judicial referee, receiver, etc. in litigation involving that litigant. An additional circumstance was the denial of his choice

of counsel on grounds that were facially specious. A third circumstance was denial of discovery by the hearing officer on the grounds that the constitutional issues Fredric sought to raise would be excluded on grounds of relevance. The district court dismissed the lawsuit not on grounds of *Younger* abstention, but rather on an erroneous finding of improper venue. To this end, the trial court's judgment dismissed the lawsuit "with prejudice only in the district of Oregon". Pet. App. D. The trial court also found that in the alternative the suit should be transferred to a district court sitting in Washington State, as the trial court believed itself incompetent to adjudicate the *Younger* abstention issues that had been raised, so a Washington State based federal judge should do so ER 193-4.

A three-judge Ninth Circuit panel, two judges of which are currently serving on the Ninth Circuit Judicial Council, initially affirmed this judgment on *Younger* abstention grounds, but after consideration of a petition for panel rehearing, changed the disposition to a reversal and remand to enter a judgment of dismissal without prejudice. *See* Pet.App. A, B, C. Both memorandum dispositions hover in a factual vacuum, as the trial court disclaimed any competence in considering the *Younger* abstention issues. The panel's decisions failed to acknowledge the arguments that the "extraordinary circumstances" exception to *Younger* abstention applied, let alone the uncontradicted facts demonstrating such "extraordinary circumstances".

Moreover, even dismissal without prejudice was unavailable under the Ninth Circuit's own precedents. Because damages were requested against the two appearing Appellees, *see* ER 11:1-3 (requesting damages from defendants who are not sitting Washington State judicial officials), the binding Ninth Circuit authority barred both the trial court and the Ninth Circuit Court of Appeals from dismissing the action on *Younger* grounds. *Gilbertson v. Albright*, 381 F.3d 965, 982 (9th Cir.2004) (en banc); *Adam v. Hawaii*, 235 F.3d 1160 (9th Cir. 2001). Instead, if *Younger* abstention were applicable, a stay, not dismissal, was required under the Ninth Circuit's own precedent, until such time as circumstances changed.

This case merits review for three separate reasons. First, it presents an important question long unanswered by this Court: whether *Younger* abstention applies to a lawsuit seeking damages, and if so whether *Younger* dictates a stay or dismissal of the lawsuit. Not only this panel departed from the Ninth Circuit's en banc precedent; the Court of Appeal have split far and wide on this point. *Compare Gilbertson v. Albright*, *supra*, (*Younger* applies, stay required) with *Thomas v. Texas State Bd. Of Medical Examiners*, 807 F.2d 453, 457 (5th Cir. 1987) (*Younger* inapplicable to damages claim); *Carras v. Williams*, 807 F.2d 1286 1291-1292 (6th Cir. 1986)(*Younger* inapplicable to suit seeking damages); *Bridges v. Kelly*, 84 F.3d 470, 471, 477 (D.C. Cir. 1996)(*Younger* inapplicable to suit seeking damages unavailable under District of Columbia law). Thus even though the panel did not follow the Ninth Circuit's own precedent stating that

Younger does apply, but requires a stay, the decision is nonetheless in conflict with those circuits which hold that *Younger* is completely inapplicable.

The second grounds for review is whether a Court of Appeals may dismiss a suit on a fact-intensive grounds such as *Younger* abstention where the trial court has explicitly found that it is incompetent to adjudicate the *Younger* abstention issue and instead found that that the case should be transferred to another judge with greater expertise.

The final reason this case deserves consideration by this Court is that it is enmeshed in the international legal scandal regarding Chief Judge of the Ninth Circuit Court of Appeals Alex Kozinski's website alex.kozinski.com. This scandal means that leaving final disposition of this case with the Ninth Circuit undermines public confidence in the integrity of the federal judiciary.

Three years ago the website was utilized by Judge Kozinski to violate Canon 3(A)(6) of the Code of Conduct of United States Judges by publicly commenting on a related case presenting the same underlying issue as herein: the Ninth Circuit's institutionalized policy of refusing to allow recourse under 42 U.S.C. §1983 via improper application of various jurisdictional doctrines such as *Younger* abstention and the *Rooker-Feldman* doctrine.

The pursuit of a misconduct complaint concerning Judge Kozinski's employment of his website in relationship to his public comments led to the discovery of his other use of that website and the Internet. *See* S. Glover, "Judge in Obscenity Case Put Explicit Photos on Web," *Los Angeles Times*

(June 11, 2008); S. Glover, "Federal Judge E-mailed Jokes to 'Gag List,'" *Los Angeles Times* (December 8, 2008). The misconduct complaints against Judge Kozinski have become their own precedent-setting matter because of the issues they raised about the operation of Judicial Misconduct and Disability Proceedings Rule 26 and the merits related issues raised therein. *See* C. Sanai, Letter of November 24, 2008 to the Hon. J. Roberts Re Kozinski Misconduct Complaint (filed with Clerk of this Court on November 25, 2008); C. Cotts, "San Francisco Court Puts Kozinski Complaint on Hold," *Bloomberg News Services* (November 5, 2008). Here two of the three judges in the panel were also sitting on a Judicial Council which has declined to investigate or dismiss related accusations against Judge Kozinski and certain other judges. The disposition of this case, under these circumstances, lacked the appearance of fairness necessary under the due process guarantee of the Fifth Amendment and under 28 U.S.C. §455(a).

OPINIONS BELOW

The Ninth Circuit's initial memorandum disposition in this action, dated May 6, 2008, Pet. App. C, is unpublished. The Ninth Circuit's June 24, 2008 order withdrawing the May 6, 2008 memorandum disposition and substituting a different disposition, Pet.App. B, is unpublished, as is the June 24, 2008 memorandum disposition attached as Pet.App. A. The September 12, 2008 order denying the petitions for rehearing and rehearing en banc, Pet. App. E, is unpublished. The

trial court's unpublished judgment of dismissal is attached as Pet. App. D.

BASIS FOR JURISDICTION

The Ninth Circuit Court of Appeals issued its order denying Fredric's Petitions for Rehearing and Rehearing en banc on September 12, 2008. Pet. App. E. Fredric invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The relevant statutory and constitutional provisions are set forth in Pet. App. E, and include the Fifth Amendment to the United States Constitution, 28 U.S.C. §455(a), and 42 U.S.C. §1983.

STATEMENT OF THE CASE

A. Introduction and Overview

In 2002, a Washington state Superior Court Judge, Joseph Thibodeau, appointed an employee of a private litigant as a "special master" in a case where the litigant was a party of record. The "special master" was tasked with a number of fact-finding and other functions normally reserved for the judicial branch. The special master, not surprisingly, took orders directly from his employer,

the private litigant, in discharging these duties.

The other side in the litigation, Viveca Sanai, was unable to find an appellate attorney to challenge the obvious attempt to allow one of the litigants to become a judge in his own case. She turned to her son, Petitioner Fredric Sanai, who had recently been admitted to the Washington State Bar after a few years as a county attorney and prosecutor in Oregon.

The efforts to overturn the conduct of the Washington State courts have been a failure, but not because any court has rejected the contentions that the appointment of a servant of a party as a judicial officer was a violation of due process. Instead the Washington State courts have engaged in retaliation toward Fredric to ensure that the ongoing practice of appointing the servants of party litigants to judicial referee, special master and receiver positions in the Washington State court system will continue unchallenged. The retaliatory actions included removing Fredric from acting as Viveca's counsel and fining him when he challenged the removal; and when Viveca's challenge to the appointment of the special master finally reached the Washington State Supreme Court, stripping her of her right to file further appellate challenges without notice or an opportunity to be heard.

The Washington State Supreme Court initiated disciplinary proceedings with Defendant the Washington State Bar Association against Fredric based on his efforts to challenge, by every legal avenue, the conduct of the Washington State courts. Fredric was eager to have a hearing, as it would, at least in theory, provide a forum to conduct discovery,

present arguments and call witnesses who would demonstrate that Washington State's court system is embroiled in the same improper practices that afflict states such as Nevada, New York and Louisiana. *See* ER pp. 27-65; *In Re Complaint of Judicial Misconduct (Porteous)*, Report and Recommendations of the Special Investigatory Committee at 39 (November 20, 2007)(filed with the Hon. J. Roberts by the Judicial Council of the Fifth Circuit).

To foreclose the opportunity for such a hearing, Defendant Joseph Mano Jr., the Washington State Bar Association hearing officer, stripped Fredric of his legal counsel, denied all relevant discovery, and relieved defendant the Washington State Bar Association from any obligation to address the constitutional issues Fredric intended to raise. Even if Mano had not taken these actions, the outcome of the disciplinary proceedings was prejudged by the fact that the Washington State Supreme Court holds the final say in disciplinary proceedings, and that institution, when faced with due process challenges to the appointment made pro se by Viveca, had stripped her of further appellate rights and imposed heavy financial penalties. When Fredric was barred from participating in the hearing by his physician due to the sudden worsening of a life-threatening cardiovascular condition, Defendants Mano and the Association chose to proceed with the hearing and disbar Fredric *in absentia*. The proceedings were completed on April 18, 2007, recommending disbarment.

Fredric filed a lawsuit seeking injunctive and declaratory relief against the defendants in district court of Oregon prior to the hearing. ER 1-11. One

of the defendants filed a motion to dismiss the complaint pursuant to FED.R.CIV.P. 12(b). ER 12-13. Fredric contemporaneously filed a motion for a preliminary injunction. This lawsuit was dismissed by the District Court solely on the grounds that venue was not proper in the district of Oregon. ER 184. To underline this ruling, the trial court's judgment dismissed the lawsuit "with prejudice only in the district of Oregon". Pet.App. D. While the trial court held that venue was not proper in Oregon, it did not find any other basis for dismissal. ER 184. Indeed, trial court also made the extraordinary admission that the policies behind *Younger* abstention justified a transfer of the case under 28 U.S.C. § 1404(a) because the court believed itself incompetent to properly address the *Younger* abstention issues, which would better be addressed by a judge sitting in Washington State. ER 193.

Soon after the district court entered its order, Fredric visited his physician and was ordered not to participate in the upcoming disciplinary hearing, due to the physician's determination that the stress would aggravate Fredric's cardiovascular ailment to life-threatening levels. Fredric immediately contacted the two appearing defendants and requested a continuance. Exhibits in Support of Motion for Inj. Pending Appeal, p. 193. Notwithstanding the uncontradicted life-threatening illness, Defendant Mano chose to proceed with the hearing, depriving Fredric of any fair opportunity to present a defense. Exhibits in Support of Motion for Inj. Pending Appeal, pp. 194-195.

B. The Underlying Proceedings

Fredric is and has been during all relevant times a resident of Oregon. ER 20 ¶1. He works as a lawyer for the county of Yamhill in Oregon. *Id.*

The circumstances of this case arose from a divorce. After many years of abuse from her husband Sassan Sanai ("Sassan"), and in fear of her life, Viveca Sanai ("Viveca") fled her family home in November of 2000. A protection order was issued removing Sassan from the house and restoring Viveca to the house. ER 15 ¶1.

Divorce proceedings ensued. Sassan dismissed his first lawyer and hired a local pro-tempore judge, William Sullivan ("Sullivan").[1] ER 15 ¶2. Fredric

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[1] Under Washington State law, an attorney can be appointed as a pro-tem judge of a tribunal that the attorney regularly appears before. *See, e.g.* Washington State Bar Association ("WSBA") Informal Advisory Opinion 1790 (1997). Though such conduct has been condemned by the American Bar Association's model rules of judicial conduct, the Washington State Supreme Court rejected that position. *See* WSBA Formal Advisory Opinion 160 (1975). Similarly, an attorney can be the partner of another attorney who is a judge or other judicial official, and still deal with matters before that judicial official. *See* WSBA Informal Advisory Opinion 936 (1985). The Washington State Supreme Court also permits lawyers to simultaneously lead election campaigns for a judge and contribute money to them while appearing before the judge. WSBA Informal Advisory Opinion 1161 (1985); WSBA Informal Advisory Opinion 1694 (1997). There has been one case where a judge chose to simultaneously act as the defendant's appointed criminal defense counsel; the judge received a short suspension and public reprimand, which was viewed by the dissent as largely retaliation for the judge's issuance of press releases concerning the four-year investigation. *In re Disciplinary Proceeding*

submitted some declarations on factual matters in the proceedings, but otherwise was not involved in the litigation. ER 20 ¶4. Fredric was never identified as a witness at the divorce trial by either side, nor was he called to testify. *Id.* After the trial was completed, Sullivan convinced the judge who conducted the trial, Snohomish County Superior Court Judge Joseph Thibodeau, to appoint Sassan's accountant Philip Maxeiner, a witness in at trial, as a referee who now controls all of Viveca's finances. ER 15 ¶3. The trial court issued a final decree incorporating Maxeiner's appointment on April 12, 2002. ER 104-106. Both Sassan and Viveca appealed the decree. ER 15 ¶4.

At this time Fredric became Viveca's appellate counsel and co-counsel at the trial level. The reason Fredric was hired was because the trial attorney would not agree to challenge Maxeiner's appointment on appeal, due to his belief that the Washington State courts would not consider any kind of due process argument concerning the appointment of Maxeiner. It subsequently became obvious that that Washington judicial officials regularly rule in cases in which they have accepted money from one of the litigants or the litigants'

Against Michels, 150 Wn.2d 159, 178, 75 P.3d 950 (2003) (Sanders, J., dissenting). In the civil context, a part-time or pro-tempore judge may simultaneously represent a litigant in court and adjudicate a different case involving the same litigant. Washington's ethical rules do not bar a judge from appointing a litigant or a litigant's servant as a judicial officer in a proceeding involving that litigant; while the statutory rules forbid this, the statutes are ignored by the Washington State appellate courts.

attorneys through a variety of means. *See* fn. 1, *supra*.

Sassan filed a motion to disqualify Fredric as Viveca's counsel. The grounds were, *inter alia*, that Fredric had filed declarations in the dissolution action, making him a witness, and that Fredric had a conflict of interest because he was suing Sassan. Because many of the same grounds asserted by Sassan for disqualification of Fredric truly applied to William Sullivan, a motion to disqualify him was filed as well in the dissolution action and other actions involving the wiretapping claims. ER 21 ¶5.

On September 27, 2002, Judge Joseph Thibodeau disqualified Fredric from acting as Viveca's counsel with the rationale that Fredric was "actually bringing more heat to this case than anything else. He's a party suing the very individual he's now attempting to be a representative against. That seems to be a conflict on its face." ER 110-114. Judge Thibodeau denied the motion to disqualify Sassan's lawyer William Sullivan with no explanation as to how their situations were different. *Id.*

On October 23, 2002, Viveca filed a notice of appeal of the order disqualifying Fredric. Viveca also challenged certain of these orders by motion. ER 21 ¶6. On November 4, 2002, Commissioner Craighead of the Washington State Court of Appeals ruled that though the parties believed that the WA.R.APP.P. 17 motion procedure was the appropriate procedure for the Court of Appeals to review the challenged post-judgment procedural orders, the relevant orders of the trial court had to be addressed by discretionary

review or appeal; she did not say which was appropriate. ER 116-117. Commissioner Craighead also ruled that "The third order [challenged] disqualifies Fredric Sanai from representing Appellant in the trial court." *Id.* Accordingly, Fredric continued to represent Viveca in the Court of Appeals and Supreme Court levels, but not at the trial court level.

Fredric on behalf of Viveca complied with Commissioner Craighead's November 4, 2002 order by filing WA R.APP.P. 6.2(b) motions for the Washington State Court of Appeals to determine whether the relevant orders were appealable or reviewable by discretionary review only, and if the latter, to request the Court to grant discretionary review. On March 11, 2003, the Washington State Court of Appeals dismissed all of Viveca's post-judgment appeals, including the appeals of the order disqualifying Fredric, on the grounds that none of the orders appealed were appealable. ER 21 ¶7; ER 119-121.

Fredric on behalf of Viveca filed a Motion for Discretionary Review of the Washington State Court of Appeals' March 11, 2003 order with the Washington State Supreme Court. Rather than ruling on them, the Commissioner of the Washington State Supreme Court *sua sponte* requested three pages of briefing on the question of whether Fredric was disqualified from acting at this level. ER 123. Briefing was submitted, and the Commissioner issued a ruling on June 10, 2003, disqualifying Fredric from acting for Viveca at all. A motion for modification, filed by Viveca *pro se* without Fredric's assistance, was denied without comment, and Viveca

and Fredric were sanctioned $1,000, without notice or an opportunity to be heard. ER 21 ¶8; ER 125. The Washington State Supreme Court also instructed Defendant the Washington State Bar Association to initiate the disciplinary proceedings at issue here. ER 22 ¶9.

Viveca proceeded on the appeal *pro se*, with assistance from counsel outside of Washington. Her opening brief contended that:

> The second fundamental error was in appointing Sassan's accountant Philip Maxeiner as a "Special Master", but then imbuing him with the power and authority of a receiver when Maxeiner does not and cannot meet the mandatory qualifications of a receiver under RCW 7.60.
>
> ....
>
> Second, Maxeiner is an "interested party" within the meaning of RCW 7.60.020. This provision provides that "no party or attorney or other person interested in an action shall be appointed receiver therein." The reference to "attorney or other person interested in an action" dictates that no representative or advisor to a party may be appointed receiver. The reason for this is obvious. The receiver owes a duty to the court and all parties--it is completely inconsistent with principles of wise judicial administration to entrust the assets at the center of a conflict to a person who is not neutral.

> Indeed, the Washington Supreme Court disbarred a lawyer who engineered the appointment of a receiver he secretly controlled in order to fraudulently place a corporation he owned into receivership as a defense against an employee lawsuit. *In re Little*, 40 Wn.2d 421 (1952).

ER 127-130.

In an opinion written by Justice Baker, the Court of Appeals agreed with Viveca that Maxeiner was not a special master, but then appointed him as a **judicial referee**. ER 132-133. The author of the opinion, William Baker was, before his appointment to the Washington State Court of Appeals, a name partner in the small Everett, Washington law firm of Anderson Hunter (then called Anderson, Hunter, Dewall, Baker & Collins). *See e.g. Himango v. Prime Time*, 37 Wn. App. 259, 680 P.2d 432 (1984) (Justice Baker listed as counsel); *Odegaard v. Everett School Dist.*, 55 Wn. App. 685, 780 P.2d 260 (1989) (Justice Baker still listed as name partner). Sassan was a client of Anderson Hunter for many years, including the period in which Justice Baker was one of its name partners. One of Justice Baker's former partners, Virginia Antipolo-Utt, handled the ERISA accounts that were one of the primary assets in the marriage dissolution case since 1988, and was a witness in the divorce proceeding. ER 15-16 ¶7. Viveca discovered this information after the opinion was issued. She filed a motion for rehearing, arguing as follows:

> Maxeiner could not act as a referee, as he is not neutral, was a witness at

> trial, and is not an attorney. His appointment as referee was a violation of statute and my constitutional rights of due process, and thus illegal and void. Moreover, Maxeiner's status as a putative referee makes manifest that certain other of this Court's holdings in the opinion were erroneous.

ER 149.

Viveca also requested that the opinion be vacated and Baker recuse himself. ER 136-149. The Court of Appeals denied the motion without giving any reason. ER 151.

Viveca filed a petition for review with the Washington State Supreme Court, again without any assistance or participation by Fredric. Her petition presented, *inter alia*, the following question to the Washington State Supreme Court:

> Is it a violation of RCW 4.48.040, the jurisdiction of the Washington State Courts and a party's due process rights to appoint the opposing party's accountant who appeared as a witness at trial as a referee in the post-trial proceedings, including allowing the referee to file federal tax returns on behalf of the party?
>
> ...
>
> The Court of Appeal agreed with Viveca that Maxeiner was not a special master, but rather surprisingly ruled he was a referee, given that Maxeiner did not meet the

> requirements for taking this judicial office under RCW 4.48.040. Maxeiner is not a "duly admitted and practicing attorney." RCW 4.48.040(3). He is an accountant, as noted in the opinion. Maxeiner is not competent to act as a juror between the parties, as he is Sassan's accountant and was a witness at the dissolution trial, where he acknowledged that he answered only to Sassan. [11/14/2001 RP 267:7-23.] RCW 4.48.040(2). Maxeiner's appointment was thus a violation of statute, the appearance of fairness doctrine, and Viveca's due process rights.

ER 152-156.

In the opposition to the petition, respondent Sassan did not contest that the appointment of Maxeiner was a violation of Viveca's due process rights. Viveca wrote in her reply:

> Even if Respondent and the Court of Appeals were correct, and there are absolutely no statutory standards whatsoever governing whom a judge can appoint as a referee to dispose of over a million dollars of property, the appointment of Maxeiner would still be illegal as a violation of the federal due process guarantee imposed on the states by the Fifth and Fourteenth Amendments. Basic principles of due process require that that a person

> undertaking a judicial function be impartial. Speaking of administrative hearings, and articulating the procedural requirements "demanded by rudimentary due process" in that setting, the United States Supreme Court has said that, "of course, an impartial decision maker is essential." *Goldberg v. Kelly*, 397 U.S. 254, 267, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). This principle applies with even greater force to persons appointed with the power of the judiciary. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). The Washington State courts have ruled repeatedly that the same requirements for the appearance of impartiality that apply to judges also apply inferior adjudicators such as members of planning commissions. *Buell v. City of Bremerton*, 80 Wn.2d 518, 525, 495 P.2d 1358 (1972). Notably, Respondent **does not contest** that the appointment of Maxeiner was a violation of Viveca's due process rights, hoping that this Court will ignore the issue. It should not do so.

ER. 158-159.

The Washington State Supreme Court's response to these federal claims was an order requiring her to pay thousands of dollars in sanctions directly to the Supreme Court and cutting off her appellate rights if she did not do so. ER 162. Viveca had no notice of

these sanctions, explanation as to why they were imposed, nor any opportunity to be heard.

The response of the Washington State Supreme Court to Viveca's unopposed contention that the appointment of Maxeiner violated her constitutional rights—imposing a fine payable to the court without notice, an opportunity to address the fine, or an explanation—demonstrates that the Washington State Supreme Court will not in good faith address any constitutional claims concerning the corrupt appointment of Maxeiner.

The divorce litigation spawned other litigation as well. While the divorce was ongoing, Viveca engaged Fredric to mount an additional lawsuit seeking to partition the assets in the divorce that Judge Thibodeau had either left unallocated or had been hidden by Sassan. Thought Washington State's published case law is crystal clear that such lawsuits are proper and not subject to res judicata or collateral estoppel, the Court of Appeals ignored its binding precedents and held that res judicata barred the lawsuit. A federal challenge to Washington State Court's illegal disqualification of Fredric was dismissed for lack of jurisdiction on *Rooker-Feldman* grounds.[2] Sassan was also successful in enlisting a

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[2] The district court judge in that suit relied on erroneous Ninth Circuit precedent which held that *Rooker-Feldman* bars federal lawsuits which seek to challenge determinations of lower court actions. While an appeal of the district court's decision was awaiting, this Court issued its decision in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 125 S.Ct. 1517, 161 L. Ed. 2d 454 (2005)**Error! Bookmark not defined.**, which held that *Rooker Feldman* does not apply when the federal litigation is initiated while the state litigation in question is ongoing. "*Exxon Mobil* makes clear that the *Rooker/Feldman*

federal court judge to bar Viveca and Fredric from mounting any challenges to Maxeiner's performance of the tasks assigned by Judge Thibodeau. That case is effectively stayed.

As instructed by the Washington State Supreme Court, the Washington State Bar Association instigated a disciplinary proceeding against Fredric. All of the charges relate to actions Fredric took to attack Maxeiner's appointment directly or indirectly. The Association appointed as a hearing officer Defendant Mano, who is a private attorney that makes his living as a special purpose judicial officer in multiple courts and tribunals. ER 16 ¶11.

Fredric was initially represented by counsel Lee Street and Cyrus Sanai (counsel in the lower court proceedings in this action) in association with Mr. Street. The initial hearing was called off when Mr. Street had to withdraw due to serious illness. Cyrus again applied for admission *pro hac vice*, this time in association with Fredric, and was denied. ER 16 ¶12. None of the reasons for denial arose from a conflict of interest or counsel's lack of qualification as a lawyer. ER 86-88. Fredric was unable to obtain counsel able to become familiar with this case at that late date. ER 20 ¶3.

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doctrine precludes federal district court jurisdiction only if the federal suit is commenced after the state court proceedings have ended. *See id.* at 1527 ("[N]either *Rooker* nor *Feldman* supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains sub judice in a federal court.")" *Dornheim v. Sholes*, 430 F.3d 919 (8th Cir. 2005). However, there was no opportunity to properly raise the issue before the Ninth Circuit, which affirmed the district court based on a case that was decided after *Exxon Mobil*.

Fredric also propounded various requests for admission against the association. The requests for admission included the following:

> 10. It is a violation of a private litigant's fundamental due process right if a person employed by an opposing party serves as a judicial officer in such litigation.
>
> 11. It is a violation of a private litigant's fundamental due process right if a person then employed as a paid professional of an opposing party simultaneously serves as a judicial officer in a lawsuit between the private litigant and the opposing party.
>
> 12. Any proceeding which violates a litigant's fundamental due process rights is void.
>
> 13. Any order which violates a litigant's fundamental due process rights is void.
>
> 14. Any transfer of property of a litigant which violates a litigant's fundamental due process rights is void.
>
> 15. Philip Maxeiner was a witness in the divorce trial of Viveca Sanai and Sassan Sanai.
>
> 16. Philip Maxeiner was at the time of the trial and thereafter the accountant

of Sassan Sanai and his medical corporation.

17. Judge Thibodeau appointed Philip Maxeiner as a special master in the divorce trial.

18. The duties and powers which Judge Thibodeau ordered Philip Maxeiner to perform and to have were those of a judicial referee, not a special master.

19. The Washington State Court of Appeal held that Philip Maxeiner was in fact a judicial referee.

20. Fredric Sanai, on behalf of Viveca Sanai, and Viveca Sanai in a *pro se* capacity, challenged the appointment of Philip Maxeiner as a special master before the Washington State Court of Appeals on the grounds, *inter alia*, that his appointment was a violation of her fundamental due process rights.

...

31. Fredric Sanai was engaged by Viveca Sanai to file an appellate challenge of Judge Thibodeau's decision in the divorce proceedings between her and Sassan Sanai.

32. Judge Thibodeau disqualified Fredric Sanai from representing Viveca on the grounds, *inter alia*, that there

was a conflict of interest arising from Fredric's lawsuit against Sassan Sanai.

33. There is in fact and under the law no conflict of interest for an attorney to represent a client against an adversary when the attorney is simultaneously suing the adversary.

34. Fredric Sanai was never identified as a potential witness for the divorce trial.

35. Fredric Sanai was never called as a witness in the divorce trial.

36. Judge Thibodeau disqualified Fredric Sanai from representing Viveca on two grounds: first, that there was a conflict of interest arising from Fredric's lawsuit against Sassan Sanai.

37. Fredric's lawsuit against Sassan Sanai did not as a matter of law constitute a conflict of interest barring him from representing Viveca Sanai.

38. A party in litigation has a right to counsel of his or her choice, subject to application of written rules of conflict of interest.

39. Judge Thibodeau's disqualification of Fredric Sanai violated Viveca Sanai's due process rights.

> 40. Judge Thibodeau's disqualification of Fredric Sanai violated Fredric Sanai's due process right by removing him from the case arbitrarily.

ER 67-72.

Mano relieved the Association from any obligation to address these contentions, and called several of them "irrelevant". ER 80-81.

Mano also issued an order barring pre-trial discovery from any judicial officials without his prior consent. When Fredric tested the order by requesting that subpoenas be authorized from two jurists who had knowledge of the underlying facts and one, Chief Judge Alex Kozinski, who had recused himself in order to write an article[3] addressing the ongoing litigation, Mano denied them on the grounds that no testimony whatsoever from judicial officials would be admitted into the hearing. ER 83-84.

The final pieces in this puzzle occurred after the dismissal of this lawsuit by the trial court.[4] Due to the onset of severe headaches and discomfort,

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[3] *See* A. Kozinski, "Kozinski Strikes Back," *The Recorder*, September 23, 2005.

[4] These additional jurisdictional facts were not before the trial court, however this Court has held that such subsequent facts may be considered by an appellate court evaluating the applicability of *Younger* abstention, which is an issue in this appeal. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 436 (1982). The citations are to the declaration and exhibits filed contemporaneously with the Ninth Circuit Court of Appeal in support of Appellant's motion for an injunction pending appeal.

Fredric obtained an emergency appointment with his physician. Discovering that Fredric had life threatening elevation in his blood pressure due to a pre-existing cardiovascular condition, Fredric's physician barred him from participating in any stressful trials or other legal proceedings. F. Sanai Decl. in Support of Motion for Inj. Pending Appeal ¶4; Exhibits thereto. p.198 ¶¶3-4. Fredric immediately informed defendants Mano and the Association of his incapacity, took a week of medical leave, and canceled all of his trial appearances for the subsequent five weeks in accordance with his physician's instructions. F. Sanai Decl., *supra*, ¶4. Defendants Mano and the Association chose to proceed with the hearing *in absentia*, notwithstanding the overwhelming evidence of Fredric's illness. Exhibits, *supra*, pp. 194-195. The result is that Fredric was deprived of any fair opportunity to defend himself in the disciplinary proceedings.

The hearings officer recommended disbarment of Fredric. The Association then moved for a preliminary suspension of Fredric while his appeal was before the Washington State Supreme Court. In a dramatic hearing, Washington State Supreme Court Justice Richard Sanders launched the first meaningful cross-examination of the Bar Association's position, and it was found wanting. The Bar Association lost the motion. *See* http://www.tvw.org (enter "Sanai" into the "Find" box). Briefing has been completed.

Fredric filed the instant lawsuit, seeking injunctive relief and damages against all defendants who are not sitting judicial officers (and thus

immune from damages). Fredric filed a lawsuit seeking injunctive and declaratory relief against the defendants in district court of Oregon. ER 1-11. One of the defendants filed a motion to dismiss the complaint pursuant to FED.R.CIV.P. 12(b). ER 12-13. Fredric contemporaneously filed a motion for a preliminary injunction. This lawsuit was dismissed by the District Court in an oral order solely on the grounds that venue was not proper in the district of Oregon. ER 184. To underline this ruling, the trial court's judgment dismissed the lawsuit "with prejudice only in the district of Oregon". Pet.App. D. While the trial court held that venue was not proper in Oregon, it did not find any other basis for dismissal. ER 184. Indeed, the trial court also made the following extraordinary admission in a written order that clarified the trial court's oral dismissal order of the previous day:

> To clarify the court's April 12, 2007 oral ruling, *Younger* was not raised on the basis of jurisdiction. Rather, I find the principles of *Younger* counsel against an Oregon court hearing a case involving Washington State Bar proceedings. Thus, the *Younger* principles support sending the case to Washington under 28 U.S.C. 1404(a)....

ER 193

The trial court thus admitted that it had not even considered whether the factual predicates of *Younger* abstention were available, as it believed that it was incompetent to consider them. Thus the trial court dismissed the lawsuit solely on basis of venue, in

defiance of the binding Ninth Circuit precedent holding that venue was proper in Oregon. *See* Pet.App. D; *Myers v. Bennett Law Offices*, 238 F.3d 1068 (9th Cir. 2001). The trial court's judgment reads as follows: "IT IS HEREBY ORDERED that this action is DISMISSED with prejudice in the District of Oregon only". Pet.App. D.

On appeal, the Ninth Circuit disregarded the venue issue, and affirmed the judgment on *Younger* abstention grounds. Pet. App. C. Fredric filed a petition for panel rehearing, pointing out that under *Gilbertson v. Albright*, *supra*, a stay and not dismissal was required, that under other Ninth Circuit precedent, a jurisdictional dismissal also had to be without prejudice, and finally that there was no factual grounds for finding *Younger* abstention.

The three-judge pane denied the petition for rehearing but vacated the first disposition and replaced it with a new memorandum decision. Pet.App. B. The new memorandum decision changed the disposition from an affirmance to a reversal and remand. Pet.App. A. The accompanying order stated that "[w]e deny Appellant's request for an order directing the district court to stay the action because the request was raised for the first time in the petition for rehearing." Pet.App. B. A petition for rehearing and rehearing en banc, which pointed out that in Fredric's opening brief he challenged the improper disposition of the trial court under *Gilbertson v. Albright* was denied without explanation. Pet. App. E.

WHY THE PETITION SHOULD BE GRANTED

1. This Case Presents an Opportunity to Address the Deep Circuit Split Concerning the Application of *Younger* Abstention to Lawsuits Claiming Damages.

The Courts of Appeal are divided as to the application *Younger* abstention to lawsuits under 42 U.S.C. §1983 claiming damages for violation of civil rights by state actors. This division is well-recognized in the academic literature. As the leading treatise on litigation under 42 U.S.C. §1983 puts it:

> lower court decisions are in conflict over the applicability of *Younger* abstention to federal court monetary claims. A sampling of circuit court decisions demonstrates the range of positions. Even within some circuits, the decisions are not consistent.

M. Schwartz & J. Kirlin,. Section 1983 Litigation §14.03E (3rd. ed. 1997 & Cum. Supp. 2003)(footnotes omitted).

Younger abstention arose from a lawsuit seeking to enjoin ongoing state criminal proceedings. *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Since that decision, its application to lawsuits which seek damages has never been squarely addressed by this Court. *See Deakins v. Monaghan*, 484 U.S. 193, 209-210, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988)(White, J., concurring).

Decisions in the Second, Fifth, Sixth and District of Columbia Circuits reject the application of *Younger* to lawsuits claiming damages. *See Rivers v. McLeod*, 252 F.3d 99 (2d Cir. 2001)(*Younger* not applicable to suits seeking damages); *Thomas v. Texas State Bd. Of Medical Examiners*, *supra* (5th Cir. 1987) (*Younger* inapplicable to damages claim); *Carras v. Williams*, *supra* (6th Cir. 1986)(*Younger* inapplicable to suit seeking damages); *Bridges v. Kelly*, *supra* (D.C. Cir. 1996)(*Younger* inapplicable to suit seeking damages unavailable under District of Columbia law).

The First, Seventh, Ninth and Tenth Circuit have issued decisions supporting its application, with various formulations and glosses. *Landrigan v. City of Warwick*, 628 F.2d 736 (1st Cir. 1980); *Majors v. Engelbrecht*, 149 F.3d 709 (7th Cir. 1998); *D.L. v. Unified S.D.*, 392 F.3d 11223 (10th Cir. 2004); *Gilbertson v. Albright*, *supra*. The Ninth Circuit held that *Younger* is applicable to damages claims, but that the suits in such cases must be stayed, rather than dismissed. *Gilbertson v. Albright*, *supra*. The particular panel refused to apply *Gilbertson* to this case on the erroneous grounds that the issue had not been raised in the opening brief. In fact the erroneous disposition had been directly addressed, and *Gilbertson v. Albright* cited twice in the opening brief.

Because *Gilbertson v. Albright*, an en banc opinion, foreclosed any argument to the Ninth Circuit that *Younger* was facially inapplicable, Fredric did not argue that point to the trial court or to the Ninth Circuit. However, his contentions are not constrained by Ninth Circuit precedent in this

proceeding, so Fredric respectfully submits that *Gilbertson v. Albright* is wrongly decided, and that *Younger* abstention should be inapplicable to any lawsuits where damages are claimed against any defendant not subject to absolute immunity from damages. Because Fredric could not raise this argument to the Ninth Circuit in the face of its en banc holding in *Gilbertson v. Albright*, he cannot be found to have waived this argument. Whether this Court agrees with the position or not, it is appropriate for this Court to squarely address this issue, which divides the Courts of Appeal into multiple inconsistent camps.

The position advocated by Fredric in this petition has been endorsed by at least three Courts of Appeal. As the late Justice White pointed out in his concurrence in *Deakins*, it is an important issue that so far has not been directly addressed by this Court. This Court should grant certiorari for this reason alone.

2. If this Court Finds that *Younger* is Potentially Applicable, Did the Ninth Circuit Err in Applying it Where the Trial Court Disavowed Making any Findings on this Issue?

If this Court agrees with the Ninth Circuit that *Younger* is potentially applicable, then the next question is whether the factual foundation for *Younger* existed in this case.

When a state bar disciplinary proceeding is ongoing, a plaintiff seeking to enjoin that proceeding on constitutional grounds must typically defend against the contention that *Younger* abstention may apply. *Younger* abstention applies to a suit under 42

U.S.C. §1983 when the "*Middlesex*" factors are met: "Absent 'extraordinary circumstances' (including but not limited to bad faith and harassment), abstention in favor of state judicial proceedings is required if the state proceedings (1) are ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims." *Gilbertson v. Albright, supra, quoting Hirsh v. Justices of the Supreme Court of the State of Cal.*, 67 F.3d 708, 712 (9th Cir. 1995); *see also Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982). This Court has held that financial interest in the litigation, in addition to bad faith or harassment, is one of the extraordinary circumstances which cancels the application of *Younger* abstention. In *Gibson v. Berryhill*, 411 U.S. 564, 577-579, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973), this Court ruled that an injunction would lie against an administrative professional disciplinary body whose members were likely to obtain additional business if the practices of the plaintiff optometrist were held to be illegal. Such financial interest in the outcome of the administrative proceedings was significant enough to mandate an injunction against the proceedings.

The *Middlesex* decision directly addressed some of the elements a state bar disciplinary proceeding must provide in order to meet requirement of an "adequate opportunity to litigate federal claims" that merits the application of *Younger* abstention. These elements include the right to "counsel, [that] discovery is available, and all witnesses are sworn". *Middlesex, supra*, at 427. The thrust of the plaintiffs' challenge in *Middlesex* was that there was

no adequate opportunity to litigate constitutional claims in that forum. The Third Circuit Court of Appeals agreed, but while this Court was considering the case, the New Jersey Supreme Court altered the rules to permit constitutional claims to be heard, and actually addressed the concerns of the plaintiffs. This Court held that this proof of actual bona fide consideration of the constitutional claims, belated though it might be, required that the Third Circuit's decision be reversed. What is important to note in *Middlesex* is that this Court looked not only at the letter of the procedures, but also whether the rules were applied appropriately in practice by the state court institution under attack. Thus it is not enough that the procedures exist in theory; they must be available in practice.

Fredric's suit was dismissed under a FED.R.CIV.P. 12(b) motion. This Court pointed out two years ago that:

> Second, in some instances, if subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own. *See* 5B C. Wright & A. Miller, Federal Practice and Procedure §1350, pp. 243–249 (3d ed. 2004); 2 Moore §12.30[3], pp. 12–37 to 12–38. If satisfaction of an essential element of a claim for relief is at issue, however, the jury is the proper trier of contested facts. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 150–151 (2000).

Arbaugh v. Y & H Corp, 546 U.S. 500, 514, 126 S.Ct.

1235, 163 L.Ed.2d 1097 (2006).

Here, the application of *Younger* abstention turns on whether the third prong, an adequate opportunity to litigate federal claims, in fact existed, and whether "extraordinary circumstances" of a due process nature so compromised the bar proceedings that an injunction would be appropriate. This jurisdictional issue dovetails with liability under 42 U.S.C. §1983; if a lack of an opportunity to litigate federal claims or "extraordinary circumstances" of the kind alleged by Fredric in fact exist for purposes of establishing jurisdiction, then they likewise exist to establish liability. Thus neither of the lower courts were permitted to make any fact findings and instead were required to rely on Fredric's pleadings.

Fredric's pleadings allege comprehensive deprivation of his constitutional due process rights by the Washington State Bar Association and its hearing officer. Additional deficiencies were elicited by Justice Sanders in the hearing available on-line.

The trial court never addressed these points, as it dismissed the complaint on erroneous venue grounds that the Ninth Circuit declined to support. Indeed, the trial court explicitly disavowed any finding that *Younger* stripped it of jurisdiction, and instead found that under the policies underlying *Younger*, it was incompetent to address the *Younger* issues and that a Washington State based court should take the case by transfer. ER 193-4.

The Ninth Circuit's own analysis is completely deficient in coming to grips with the factual contentions made by Fredric, stating only that:

> *Younger* abstention requires dismissal

> of this action. *See Younger v. Harris*, 401 U.S. 37 (1971); *see also Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) (setting forth *Younger* abstention doctrine requirements in the context of state bar disciplinary proceedings); *Hirsh v. Justices of Supreme Court of Cal.*, 67 F.3d 708, 713 (9th Cir. 1995) (per curiam) (concluding that Younger abstention was appropriate where appellant faced ongoing state bar disciplinary proceedings when he brought suit in federal court).

See Pet. App. A.

Citing cases involving New Jersey and California bar proceedings where the case arises from Washington State, with no analysis of the different facts, is inadequate. Holding that *Younger* abstention applied where the trial court had made no such findings was not merely inadequate, it was deprivation of an opportunity to be heard on this issue. As Chief Judge of the Ninth Circuit Court of Appeals Alex Kozinski pointed out, a complete failure to properly address facts can constitute a due process default:

> In instructing jurors about their fact-finding function, we normally advise them to consider the entire record, not individual pieces of evidence standing alone....
>
> What goes for juries goes no less for judges. In making findings, a judge

> must acknowledge significant portions of the record, particularly where they are inconsistent with the judge's findings. The process of explaining and reconciling seemingly inconsistent parts of the record lays bare the judicial thinking process, enabling a reviewing court to judge the rationality of the fact-finder's reasoning. On occasion, an effort to explain what turns out to be unexplainable will cause the finder of fact to change his mind. By contrast, failure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached, and hence on the correctness of the finding. *See, e.g., Gui v. INS*, 280 F.3d 1217, 1228 (9th Cir. 2002) ....

Taylor v. Maddox, 366 F.3d 992, 1007-1008 (9th Cir. 2004).

In this case, the factual prerequisites for application of *Younger* abstention, such as basic due process protections, were completely lacking. The trial court made no findings on this issue and indeed made a point of stating that it was not making any rulings concerning *Younger* or the factual underpinnings thereof. ER 193-4. The Ninth Circuit's decision was thus completely unmoored from any factual findings by the trial court.

The primary grounds for review of this case is the long-standing circuit split concerning the application

of *Younger* abstention to lawsuits seeking damages. The additional due process deficiency of the Ninth Circuit's opinion must be reviewed in tandem for a just disposition of this.

3. The Presence of Two of the Panel Members on the Judicial Council Considering the Ongoing Misconduct Proceedings Involving Chief Judge Kozinski Raise an Issue of Lack of Appearance of Impartiality.

One month after the panel issued its initial memorandum disposition in this matter and the initial petition for rehearing was filed, the Los Angeles Times acted on a tip from Fredric's trial and Ninth Circuit counsel, Cyrus Sanai, and published an article discussing Chief Judge Alex Kozinski's use of his website, alex.kozinski.com, to store and distribute explicit photographs and videos. *See* S. Glover, "Judge in Obscenity Case Put Explicit Photos on Web," *Los Angeles Times* (June 11, 2008). Judge Kozinski was at the time presiding over the first obscenity trial in Los Angeles County in decades. The consequences of that article and Cyrus' subsequent misconduct complaint against Judge Kozinski and certain other judges are still playing out.

Spurred by Cyrus's complaint, former Head of the Administrative Office of the Courts Ralph Mechem filed his own misconduct complaint against Chief Judge Kozinski and two other Ninth Circuit Judges. *See* C. Cotts, "Retired U.S. Court Executive Files Kozinski Complaint," *Bloomberg News Services* (November 25, 2008). The Los Angeles Times

continues to investigate Judge Kozinski's use of the Internet. S. Glover, "Federal Judge E-mailed Jokes to 'Gag List,'" *Los Angeles Times* (December 8, 2008).

As for the obscenity trial over which Judge Kozinski was presiding, a mistrial was declared and the Ninth Circuit is currently considering a double jeopardy appeal by the defendant, Ira Isaacs. In connection therewith the Department of Justice filed a "Suggestion for Recusal" which argues that the entire Ninth Circuit must recuse itself from the appeal due to the ongoing judicial misconduct investigation triggered by Cyrus' revelation of Judge Kozinski's Internet activities. *See* J. Roemer, "Porn Prosecutors Seek Recusal of Entire Ninth Circuit," *Daily Journal* (November 7, 2008). The grounds asserted for recusal in that proceeding apply with equal or greater force in this case. For this reason Fredric in his petition for rehearing or rehearing en banc raised the constitutional infirmity of the panel's continued handling of the case. In particular Fredric pointed out the difficulty of two judges serving with Judge Kozinski on the Judicial Council which is fighting to keep Cyrus' misconduct complaint against Judge Kozinski out of the Third Circuit. *See* C. Sanai, Letter of November 24, 2008 to the Hon. J. Roberts Re Kozinski Misconduct Complaint.

The panel's dismissal of Fredric's complaint by *Younger* abstention when the trial court disavowed any ruling on that issue, combined with the presence of two of the panel judges on the Judicial Council, and the Department of Justice's contention that the entire Ninth Circuit be disqualified from any case related to the *Los Angeles Times* articles, taken as a whole, raise in any reasonable observer's mind the

possibility that the ultimate resolution of Fredric's case by the Ninth Circuit Court of Appeals was made by judges whose impartiality could reasonably be questioned. As this Court pointed out, under 28 U.S.C. §455(a), a judge must disqualify himself even if he was previously unaware of the facts giving rise to an appearance of the absence of impartiality:

> a violation of § 455(a) is established when a reasonable person, knowing the relevant facts, would expect that a justice, judge, or magistrate knew of circumstances creating an appearance of partiality, notwithstanding a finding that the judge was not actually conscious of those circumstances.

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 850, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988).

In this case, the close relationship between Fredric and the person who publicly unveiled Judge Kozinski's use of his website, the prior involvement of Judge Kozinski in writing about the *Sanai* cases,[5] the close working relationship required among judges serving together on a Circuit Judicial Council, and the cavalcade of additional revelations, news stories and misconduct proceedings would lead any reasonable person to view this matter as one that should have been finally disposed of by different judges, probably from outside the Ninth Circuit. *Schmeir v. United States Court of Appeal for the*

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[5] *See* A. Kozinski, "Kozinski Strikes Back," *The Recorder*, September 23, 2005.

Ninth Circuit, 279 F.3d 817, 819 (9th Cir. 2002)("All members of the Ninth Circuit having recused themselves from this case, all the Judges on this panel are sitting by designation")

Given that the *Sanai* cases have attracted and will continue to attract strong public interest, it is particularly important that this matter be handled in a manner that boosts public respect for the judiciary. Granting review earns that extra level of public respect, demonstrating that cases which relate to judicial misconduct will not be mishandled by the judicial body whose members committed the wrongdoing. This is a sufficiently important enough matter to suffice as an independent grounds for granting review.

CONCLUSION

For the forgoing reasons, the petition for certiorari should be granted.

Dated this December 10, 2008

Respectfully submitted,

Fredric Sanai
660 2nd Street No. 7
Lake Oswego, Oregon 97034

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 24, 2008
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FREDRIC SANAI, an individual,

Plaintiff - Appellant,

v.

GERRY ALEXANDER, an individual; et al.,

Defendants - Appellees.

No. 07-35305
D.C. No. CV-07-00295-MWM

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Submitted April 22, 2008**

Before: GRABER, FISHER, and BERZON, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Fredric Sanai, an attorney, appeals from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging civil rights violations in connection with his Washington State Bar disciplinary proceeding. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, vacate in part, and remand.

Younger abstention requires dismissal of this action. *See Younger v. Harris* 401 U.S. 37 (1971); *see also Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) (setting forth *Younger* abstention doctrine requirements in the context of state bar disciplinary proceedings); *Hirsh v. Justices of Supreme Court of Cal.*, 67 F.3d 708, 713 (9th Cir. 1995) (per curiam) (concluding that *Younger* abstention was appropriate where appellant faced ongoing state bar disciplinary proceedings when he brought suit in federal court).

Because we affirm based on the *Younger* abstention doctrine, we do not reach any other issues. We vacate the district court's judgment and remand with instructions to dismiss the action without prejudice.

Sanai's request for judicial notice is denied.

The parties shall bear their own costs on appeal.

AFFIRMED in part; VACATED in part; and REMANDED WITH INSTRUCTIONS.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 24, 2008
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FREDRIC SANAI, an individual,

Plaintiff - Appellant,

v.

GERRY ALEXANDER, an individual; et al.,

Defendants - Appellees.

No. 07-35305
D.C. No. CV-07-00295-MWM

ORDER

Before: GRABER, FISHER, and BERZON, Circuit Judges

The memorandum disposition filed on May 6, 2008, is withdrawn. A replacement memorandum disposition will be filed concurrently with this order.

The petition for panel rehearing is denied. We deny Appellant's request for an order directing the district court to stay the action because the request was raised for the first time in the petition for rehearing.

APPENDIX C

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
May 6, 2008
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FREDRIC SANAI, an individual,

Plaintiff - Appellant,

v.

GERRY ALEXANDER, an individual; et al.,

Defendants - Appellees.

No. 07-35305
D.C. No. CV-07-00295-MWM

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Submitted April 22, 2008**

Fredric Sanai, an attorney, appeals from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging civil rights violations in connection

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

with his Washington State Bar disciplinary proceeding. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

Younger abstention requires dismissal of this action. *See Younger v. Harris*, 401 U.S. 37 (1971); *see also Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) (setting forth *Younger* abstention doctrine requirements in the context of state bar disciplinary proceedings). The Washington State Bar disciplinary proceeding against Sanai is ongoing, implicates important state interests, and provides Sanai with an adequate opportunity to litigate his federal claims. *See Middlesex County*, 457 U.S. at 434; *see also Hirsh v. Justices of Supreme Court of Cal.*, 67 F.3d 708, 713 (9th Cir. 1995) (per curiam) (concluding that *Younger* abstention was appropriate where appellant faced ongoing state bar disciplinary proceedings when he brought suit in federal court).

Because we affirm based on the *Younger* abstention doctrine, we do not reach any other issues. Sanai's request for judicial notice is denied.

AFFIRMED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FREDRIC SANAI, No. CV 07-295-MO

Plaintiff, JUDGMENT

v.

GERRY ALEXANDER, et al.,

Defendants.

MOSMAN, J.,

Based upon the record,

IT IS HEREBY ORDERED that this action is DISMISSED with prejudice in the District of Oregon only.

DATED this 13th day of April, 2007.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
United States District Judge

APPENDIX E

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
May 6, 2008
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FREDRIC SANAI, an individual,

Plaintiff - Appellant,

v.

GERRY ALEXANDER, an individual; et al.,

Defendants - Appellees.

No. 07-35305
D.C. No. CV-07-00295-MWM

ORDER

Before: GRABER, FISHER, and BERZON, Circuit Judges

The panel has voted to deny the petition for panel rehearing filed on July 17, 2008.

The full court has been advised of the accompanying petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed case.

APPENDIX F

1. The Fifth Amendment to the U.S. Constitution provides in relevant part:

> "[N]or shall any person...be deprived of life, liberty, or property, without due process of law." U.S. Const., Amend. V, § 1.

2. 28 U.S.C. §455(a) reads as follows:

> Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

3. 42 U.S.C. §1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial

officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.